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No. 1125

In the Supreme Court of the United States

OCTOBER TERM, 1967

RONALD BORCHELT, CALVIN POPEJOY and DANIEL ANGELINI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 386 F.2d 760.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1967. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 17, 1968, and the petition was filed on

February 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a trial for mail fraud, the testimony of the victims with respect to representations made by salesmen not named as defendants was admissible into evidence.

2. Whether the evidence was sufficient to support the convictions.

STATEMENT

Petitioners and five others were indicted in the Eastern District of Missouri for using the mails for the purpose of executing a fraudulent scheme in violation of 18 U.S.C. 1341. Petitioner Borchelt was convicted on 24 counts, petitioner Angelini on 23 counts and petitioner Popejoy on nine counts. Borchelt was sentenced to imprisonment for a total of eight years—four years pursuant to 18 U.S.C. 4208(a)(2) on count 2 and certain other counts, to run consecutively to a term of four years imposed on count 1 and certain other counts. He was also fined $1000 on each of counts 1 and 28 and $500 on count 29 (Tr. 1834-1840). Angelini was sentenced to imprisonment for a total of six years—three years pursuant to 18 U.S.C. 4208(a)(2) on count 2 and certain other counts, to run consecutively to a term of three years imposed on count 1 and certain other counts (Tr. 1826-1833). Popejoy was sentenced to concurrent terms of imprisonment for 30 months and was fined $1000 on count 6 (Tr. 1850-1853). The court of appeals affirmed.

The evidence is summarized in the opinion of the court of appeals (Pet. App. A, 38-40, 42-46). In brief, it showed that in 1964 and in 1965 the Chem-Plastics Corporation and its successor, the National Chem-Plastics Corporation, were engaged in the sale of franchises for paint products. Most of their sales took place on company premises in St. Louis, Missouri, or Las Vegas, Nevada, which the prospective purchasers were invited to visit after responding to newspaper advertisements (*e.g.*, Tr. 483-485). These advertisements represented that factory-trained personnel would help set up a business for the franchise purchaser (*e.g.*, Tr. 215, 567). In selling franchises of jobber, dealer, or distributor based upon the amount of paint purchased, the company representatives also promised the assistance of company employees in establishing the business (*e.g.*, Tr. 486-490, 511-514, 569-570). The purchaser was also told that he would be the exclusive jobber, dealer, or distributor in the particular area covered by the contract (*e.g.*, Tr. 1061-1062). On occasion the franchise purchaser was promised that he could return the paint products and be reimbursed if he was dissatisfied (*e.g.*, Tr. 493-494).

Typically, after a franchise was sold, no company representative would aid the purchaser despite pleas for assistance and despite the fact that some customers had originally told the salesmen they had no experience with paint or in selling (*e.g.*, Tr. 488, 493-496, 847-848). Demands for cash reimbursement were fruitless (*e.g.*, Tr. 154-155). Overlapping franchises were sold (*e.g.*, Tr. 1063). The bro-

chure used by the representatives to promote the sales also contained false statements as to financial condition of the company (Tr. 46-59).

Petitioner Borchelt was first the manager at St. Louis and then the general manager of National Chem-Plastics Corporation (Tr. 486, 1271-1272). Petitioner Angelini was a salesman with the title of vice-president (Tr. 20-21, 90-91). Both Borchelt and Angelini participated in the sales of some franchises and each represented that the purchaser would be given sales assistance and that the franchise would be exclusive (*e.g.*, 486-488, 547). Petitioner Popejoy was the president of National Chem-Plastics Corporation between July and December 1965 and was in its Nevada office (Tr. 90, 1539-1540). In response to complaints from franchise purchasers, Popejoy promised that company employees would be sent out shortly to assist them (Tr. 847-848, 908-909, 987-988).

ARGUMENT

1. Petitioners contend that the statements made to victims by company representatives not named as defendants constituted inadmissible hearsay testimony (Pet. 15-29). That contention was thoroughly considered and was properly rejected by the court below (see Pet. App. A, 47-50). What the court of appeals stated in *Reistroffer* v. *United States*, 258 F.2d 379, 387 (C.A. 8), certiorari denied, 358 U.S. 927, is likewise applicable to this case:

> Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same

> misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on.

Here, not only were the representations made by the unindicted salesmen similar to the representations made by the persons named as defendants, but in many instances the statements were made on company premises, and were thus clearly an integral part of the fraudulent scheme. Nothing in the cases cited by petitioners is to the contrary.

2. Petitioners' claim that there was no evidence that they either mailed or caused the mailing of letters pertinent to particular counts is without merit (Pet. 29-36). Criminal responsibility is not dependent upon the actual mailing of letters nor upon proof of specific directions as to mailing. It is sufficient to show that it was foreseeable that the mails would be used in the ordinary course of business in each transaction. *Pereira* v. *United States*, 347 U.S. 1, 8-9. That was clearly the situation here. Indeed, the advertisements employed to draw the victims into the scheme called for the use of the mails. Petitioners in substance are simply asserting an insufficiency of evidence. That contention was considered and rejected by both lower courts (see Pet. App. A, 41-47), and does not warrant further review in this Court.[1]

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[1] As for the claim of petitioner Popejoy that his participation in the sales was limited (Pet. 32), his position as president for a five-month period and his knowledge from customer complaints that the company was falsely representing that it would furnish assistance to the franchise purchasers amply supported the jury's finding of guilt as to him.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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